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GUILLERMO HERRERA

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,  
  
Plaintiff,  
  
vs.  
  
GUILLERMO HERRERA, *et al.*,  
  
Defendants.

Case No. CR 08-0730 WHA

**DEFENDANT GUILLERMO  
HERRERA'S MEMORANDUM RE  
SEALING SUBPOENAS DUCES  
TECUM AND PROHIBITION ON  
DISCLOSURE OF CONTENTS OF  
DEFENSE SUBPOENAS**

**INTRODUCTION**

In response to the Court's tentative response and request for briefing issued June 8, 2009, Defendant Guillermo Herrera, submits the following memorandum of authorities under which the Court may order the San Francisco Police Department not to disclose the contents of the defense Rule 17(c) subpoenas duces tecum to the government. Mr. Herrera joins in the

1 memorandum submitted by co-defendant Flores on June 17, 2009 (Docket No. 389) arguing that  
2 this Court may seal the list of items attached to the subpoena (the producement) as well as the  
3 return. We also join in the joint defense submissions as to admissibility of the subpoenaed  
4 records and the response to the motion to quash. However, as set forth in more detail below, Mr.  
5 Herrera contends that a testimonial response to the subpoenas duces tecum is necessary. Because  
6 the government may well pursue the death penalty in this case, reliance on informal proceedings  
7 for compliance with the subpoenas is inadequate under the Sixth and Eighth Amendments.

8 In addition, under the authorities set forth in more detail below, this Court may issue a  
9 temporary order sealing the subpoenas duces tecum and prohibiting witnesses from discussing  
10 the contents of those documents with the government.

### 11 DISCUSSION

12 As argued by defendant Flores, disclosure of the producement and return would reveal the  
13 defense strategy and would violate the defendant's rights under the Sixth Amendment.  
14 Additional authorities support an order sealing and protecting all of the records and information  
15 associated with the *ex parte* subpoenas duces tecum because failure to do so forces the defendant  
16 to waive work product protections in order to exercise his Sixth Amendment rights. *U.S. v.*  
17 *Beckford*, 964 F.Supp. 1010, 1015 (E.D. Va. 1997) describes the "Hobson's choice" an indigent  
18 defendant faces when he seeks a Rule 17(c) subpoena duces tecum prior to trial. If documents  
19 that reveal defense strategy are not kept *entirely* secret, the defendant is forced to choose between  
20 waiving his work product privileges or exercising his Sixth Amendment right to counsel. *Id.*  
21 Like the defendant in *Beckford*, Mr. Herrera faces a capital charge and disclosure of the contents  
22 of the subpoenas would reveal work product concerning his mitigation defenses.

23 Likewise, in an unpublished decision, the court in *United States v. Johnson*, 2004 WL  
24 877359 (E.D.La. 2004) sealed the applications in support of a Rule 17(c) subpoenas duces tecum  
25 as well as the subpoenas themselves because disclosure of those records would have revealed  
26 confidential work product and violated the defendant's Sixth Amendment rights in a capital case.  
27 The same concerns support sealing those records and issuing a protective order precluding  
28 disclosure of their contents while this case is pending.

1 The fact that subpoenas duces tecum will be served on arguably adverse witnesses does  
 2 not waive work product protection because, unlike the attorney client privilege, not all  
 3 disclosures to third parties waive the confidentiality of work product. *United States v. AT&T*, 642  
 4 F.2d 1285, 1299 (D.C. Cir. 1980); *see also Rockwell Int'l Corp. v. Dep't of Justice*, 235 F.3d 598,  
 5 605 (D.C. Cir. 2001).

6 Accordingly, this Court should seal the defense subpoenas duces tecum, the return and  
 7 productions and issue a protective order barring the witnesses from disclosing the contents of  
 8 those records to the government.

9 **The First Amendment Does Not Preclude A Court From Issuing a Protective**  
 10 **Order Barring Witnesses From Discussing Privileged and Constitutionally**  
 11 **Protected Material While A Case is Pending**

12 The Court's tentative response argues that a recipient of a subpoena is not  
 13 "automatically" duty bound to remain silent about the contents of a subpoena. That is certainly  
 14 correct, but this Court can and should issue an order requiring them to do so. As set forth in  
 15 more detail above, disclosure of the records or their contents will reveal information protected by  
 16 the Sixth Amendment and the work product privilege. In this capital case, those interests  
 17 outweigh the First Amendment interests of the witnesses to discuss the contents of the records  
 18 with the government. *See Butterworth v. Smith*, 494 U.S. 624, 632-633 (1990) *see also Seattle*  
 19 *Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984) (protective order barring disclosure of  
 20 information gained through discovery process "does not raise the same specter of government  
 21 censorship that such control might suggest in other situations" [citation omitted]).

22 In *Butterworth*, the Supreme Court upheld a Florida statute that temporarily banned grand  
 23 jury witnesses from disclosing the contents of their testimony while the grand jury investigation  
 24 was pending. The Court reasoned that the need for grand jury secrecy during that discrete period  
 25 outweighed the witness's First Amendment right to discuss the subject matter of his testimony.  
 26 *Id* at 629, 636.

27 In *Butterworth*, a reporter who had testified before a grand jury sought relief from a  
 28 Florida statute that banned him from discussing the subject of his testimony with others. *Id* at  
 629. He sought to publish a news story about the subject matter of his testimony and filed suit

1 for relief from the statute's restriction on his First Amendment right to freedom of the press. *Id*  
2 at 628. The Court upheld the portion of the statute restricting discussion of grand jury testimony  
3 about a pending investigation and held that the reporter's First Amendment interest in discussing  
4 those subjects *during* the grand jury investigation was outweighed by the government's interest  
5 in secrecy. *Id* at 629, 636.

6 The SFPD's interest in conferring with the government as a litigation tactic is less  
7 important than the First Amendment right to press freedom at issue in *Butterworth*. The SFPD  
8 has an obvious tactical reason to discuss the contents of the defense subpoenas with counsel for  
9 the United States because they share a common goal of investigating and prosecuting the  
10 defendants. However, it is well settled that a court may restrict speech of those within its  
11 jurisdiction during the course of litigation without violating the First Amendment. *E.g., Levine*  
12 *v. District Court*, 764 F.2d 590, 595 (9<sup>th</sup> Cir. 1990)(district court may restrict speech of "trial  
13 participants" *citing Shepard v. Maxwell*, 384 U.S. 333, 360-63 (1963)). Service of the defense  
14 subpoenas duces tecum on the SFPD will bring them within the jurisdiction of the court. Like all  
15 trial participants, their speech may be restricted by a court order.

16 Moreover, punishing speech that violates such orders does not implicate the First  
17 Amendment. *E.g., United States v. Fullbright*, 105 F.3d 443, 452 (9<sup>th</sup> Cir. 1997) *overruled on*  
18 *other grounds by United States v. Heredia*, 483 F.3d 913, 921 (9<sup>th</sup> Cir. 2007) (the First  
19 Amendment is not implicated when speech is unlawful). Accordingly, if this Court issues an  
20 order that prohibits the SFPD from discussing privileged material while this matter is pending,  
21 the SFPD could not raise a First Amendment defense to contempt charges for violating the order  
22 *Id*; *see also Gulf Oil Co. v. Bernard*, 452 U.S. 89, 104 fn21 (1981) (noting that "a court often  
23 finds it necessary to restrict the free expression of participants, including counsel, witnesses, and  
24 jurors); *Rhinehart, supra*, 467 U.S. 20 at 32-33, fn18 ("this Court has approved restriction on the  
25 communications of trial participants where necessary to ensure a fair trial for a criminal  
26 defendant" [citations omitted]).

27 Finally, the United States Supreme Court clearly endorsed a balancing test when First  
28 Amendment rights conflict with the need for secrecy in litigation. *Butterworth v. Smith, supra* at

630-631; *see also Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 551-52 (1976) (advocating a balancing test between First Amendment rights to free speech and Sixth Amendment rights to a fair trial). Here, Mr. Herrera's Sixth Amendment interests in this capital case are at least as compelling as Florida's interest in temporary grand jury secrecy. Moreover, Mr. Herrera's interest in maintaining the confidentiality of material protected under the Sixth Amendment and the work product privilege far outweighs the SFPD's interest in discussing the contents of the defense subpoenas duces tecum.

**The San Francisco Police Department's Suggestion That It Need Not Produce Records in Response to the Subpoenas Duces Tecum Because Some of Those Records May Have Been Produced to the Defense By the Government Violates Mr. Herrera's Right to Compulsory Process in a Capital Case**

Under the Compulsory Process Clause, a criminal defendant has a broad right to obtain trial evidence by subpoena. That right is a crucial part of the Fifth Amendment Due Process right to present a defense at trial [*E.g., Washington v. Texas*, 388 U.S. 14, 18 (1967)] and includes the right to compel the production of documentary evidence. *United States v. Hubbell*, 530 U.S. 27, 54 (2000) *citing United States v. Burr*, 25 F. Cas. 30, No. 14,692d CC Va. 1807).

The subpoenas duces tecum issued in this case require a testimonial response from the custodian of records that the responsive records are complete. The Supreme Court has repeatedly acknowledged in "act of production" cases that producing documents in response to a subpoena duces tecum has a "compelled testimonial aspect." *E.g., U.S. v. Hubbell, supra*, at p. 36. Moreover, one may not avoid the requirements of a subpoena by simply claiming that evidence sought is obtainable elsewhere. *See Covey Oil Co. v. Continental Oil Co.*, 340 F.2d 993 (10th Cir. 1965), *overruled on other grounds (citations omitted)*. The SFPD's suggestion that reference to a "discovery log" complied by the AUSA is an adequate substitute for the testimonial production of records by the custodian is incorrect.

In this case, San Francisco Police Department's ("SFPD's") legal counsel has suggested that compliance with the defense subpoenas duces tecum may be unnecessary if responsive records have already been provided by the government to the defense in discovery. The SFPD's suggestion assumes incorrectly that government issued discovery could be an adequate substitute

1 for the SFPD's testimonial response to a subpoena duces tecum signed by this court.

2       There is a fundamental constitutional distinction between records produced in discovery  
3 and those produced in response to a subpoena. A Rule 17(c) subpoena is not a discovery device.  
4 It is the exercise of Mr. Herrera's fundamental right to compel witnesses and evidence. *United*  
5 *States v. Tomison*, 969 F.Supp. 587, 593 (E.D. Cal. 1997). Mr. Herrera is entitled to obtain  
6 records by exercise of his Sixth Amendment compulsory process right, because only then can he  
7 be assured that the SFPD did a diligent search of its records and produced every page of  
8 responsive material.

9       Even if some of the records produced in discovery are redundant of records responsive to  
10 the subpoenas, this Court should order the SFPD to comply with the subpoenas and refuse  
11 SFPD's proposal that they may refer Mr. Herrera to a list of records or "discovery log" of  
12 material produced by the AUSA in discovery.<sup>1</sup> The AUSA is not the custodian of the SFPD's  
13 records and could not testify at trial. Accordingly, his or her effort to provide documents in  
14 discovery is inadequate to protect Mr. Herrera's right to compel testimonial production of those  
15 records under the Sixth Amendment.

16       There are other reasons that resort to a discovery log is an inadequate substitute for  
17 testimonial production of records compelled by subpoenas. Mr. Herrera can be certain that  
18 records provided in response to the subpoenas duces tecum are complete because the subpoena is  
19 enforceable by contempt and criminal sanctions. *Nilvia v. United States*, 352 U.S. 385, 394-395  
20 (1957.) SFPD's voluntary production of records to the government was not made under those  
21 conditions and neither was the government's production of records to the defense. At either  
22 stage of the document production (from the SFPD to the AUSA and from the AUSA to the  
23 defense) mistakes and omissions may have occurred because the production was not testimonial  
24 and was not made under the weight of potential criminal prosecution. If SFPD is permitted to  
25 substitute reference to a voluntary production of records for a testimonial response to a court  
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27       <sup>1</sup> Mr. Herrera does not know whether or not a "discovery log" has been produced by the  
28 AUSA.

1 issued subpoena, Mr. Herrera will be deprived of his right to compel witnesses and evidence at  
2 trial.

3 Likewise, the SFPD has not explained how its record custodians could testify that the  
4 records listed on a “discovery log” are the exact same records as those listed in the producement  
5 and that no pages were omitted when the AUSA produced those records to the defense. For all  
6 of these reasons, the SFPD’s suggestion that its own testimonial response to the subpoenas may  
7 be unnecessary if responsive records are listed in a “discovery log” is incorrect.

8  
9 Dated: June 18, 2009.

10 Respectfully Submitted,

11  
12 /s/ Martin Sabelli

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15 Attorney for Defendant  
16 GUILLERMO HERRERA  
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